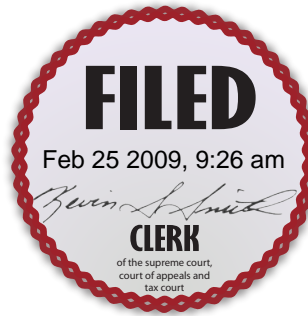


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN KORP,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 75A03-0810-CR-493

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0605-FC-20

February 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

John Korp appeals his conviction for child molesting as a Class C felony arising out of allegations made by his daughter, H.V. On appeal, Korp argues that the trial court abused its discretion by excluding evidence that Kenneth Veden, another man with access to H.V., had previously been convicted of sexual misconduct with a minor and child exploitation. Korp also argues that exclusion of this evidence violated his right to present a defense. Finding no abuse of discretion or violation of his right to present a defense, we affirm Korp's conviction.

Facts and Procedural History¹

Korp and Lynn Veden are H.V.'s parents. Korp and Lynn were never married. Lynn has physical custody of H.V., but H.V. occasionally visited with Korp at his mother's home in Knox, Indiana. On January 29, 2006, after six-year-old H.V. had spent the weekend at Korp's mother's home, Korp drove H.V. to Kenneth's home. Kenneth is Lynn's ex-husband, and Kenneth and Lynn have several children together. At that time, Kenneth had custody of these children. Due to the location of Kenneth's home in Lacrosse, Korp would occasionally drop H.V. off at Kenneth's home and Kenneth would then transport H.V., sometimes along with the other children, to Mishawaka to exchange the children with Lynn.

¹ We pause to note several issues with the transcript on appeal. Specifically, the table of contents was included in the first volume of the transcript rather than a separately bound volume. Ind. Appellate Rule 28(A)(8). Additionally, although noted in the body of the text of the transcript, there are no header or footer notations indicating where a witness's direct, cross, or redirect examination begin. App. R. 28(A)(4). Finally, Volume II of the transcript is lacking the required cover page, App. R. 28(A)(7), and its pages are out of sequential order, App. R. 28(A)(2). Although we do not know whether the Starke County Court Reporter is responsible for Volume II's missing cover page or the pages being out of order, we note that it has impeded our review of this case.

As Korp was preparing to leave Kenneth's home after dropping off H.V., Korp reached down to hug H.V. Kenneth noticed that H.V. stiffened up "like a board" when Korp touched her. Tr. p. 313. After Korp left, Kenneth asked H.V. why she was mad. At first, H.V. refused to answer, saying she could not tell because her mommy would get mad. *Id.* After Kenneth told her that her mommy would not get mad, H.V. told Kenneth that her father had been "doing nasty things" to her and "humping" her. *Id.* Kenneth advised H.V. to tell her mother what had happened.

Kenneth then drove H.V. to Mishawaka to meet Lynn at their usual exchange point. When Lynn arrived to pick up H.V., Kenneth told Lynn to call him when she arrived home to talk about something important. *Id.* at 350. On the drive to Lynn's home in Angola, H.V. told Lynn that her father had licked her private area and put his penis in her mouth and in her private area. *Id.* at 352.

That night, Lynn took H.V. to Cameron Hospital in Angola for an examination. *Id.* at 354. H.V. reported to one of the hospital nurses that her father had licked her genitals and put his penis in her genitals and her mouth. *Id.* at 379. The examination revealed there was no semen or trauma. *Id.* at 396. H.V. also reported the incident to a Steuben County Deputy Sheriff and told him that the incident took place in a reclining chair in her grandmother's home. *Id.* at 418-19. Later, H.V. was interviewed again at the Elkhart Child Advocacy Center, and she told her interviewer that Korp had "humped on her" and touched her private areas inappropriately. *Id.* at 473-74. H.V. denied that anyone else had touched her in an inappropriate way.

The State charged Korp with child molesting as a Class C felony.² The State filed a motion in limine seeking to prevent Korp from introducing evidence of Kenneth's criminal history; namely, a 1996 guilty plea to sexual misconduct with a minor and a 2007 guilty plea to Class C felony child exploitation and two counts of Class B felony dealing in a controlled substance. Appellant's App. p. 10-12. The trial court held a hearing on the State's motion during Korp's jury trial outside the presence of the jury. During the hearing, Kenneth confirmed that he had pled guilty to sexual misconduct for an offense that occurred in 1996 with a fourteen-year-old girl. Tr. p. 288. Kenneth also confirmed that his 2007 guilty plea stemmed in part from an incident in which he drugged his thirteen-year-old daughter with prescription medication so that he could photograph her breasts as she was sleeping. The trial court granted the State's motion, ruling that Korp could not use the offenses to impeach Kenneth, the rules of evidence prohibited the introduction of this evidence, and that the prejudicial effect outweighed the probative value of the evidence. *Id.* at 299-300.

At trial, Korp presented as a defense theory that Kenneth was responsible for the molestation. In opening statements, Korp's counsel mentioned that Kenneth and H.V. had been alone for several hours on January 29 and that Kenneth did not call the police or Lynn to report the molestation. *Id.* at 223-24. Counsel also mentioned that although Kenneth was the first adult to hear H.V.'s allegations, the police never interviewed or questioned him. *Id.* at 226.

² Ind. Code § 35-42-4-3(b).

At trial, H.V. testified that Korp had touched her crotch and her butt, that he had licked her crotch, that he had attempted to put his penis in her crotch but stopped when she told him it hurt, and that white stuff came out of the place where he goes to the bathroom. *Id.* at 237, 270, 275. On cross-examination, Korp's counsel asked H.V. whether Kenneth had ever touched her "cookie," H.V.'s term for vagina. *Id.* at 272. H.V. responded that he had not. *Id.*

Kenneth also testified at trial. Korp's counsel asked him on cross-examination about the time he was alone with H.V. and whether he had reported H.V.'s allegations to the police. *Id.* at 327. Korp called as a defense witness Kenneth's daughter, J.V., who testified that she had asked H.V. on several occasions who had touched her inappropriately, and that H.V. had always responded that it was Korp, not Kenneth. *Id.* at 496-98. Korp also testified on his own behalf. Korp testified that he was never alone with H.V. and that he had left H.V. at his mother's house while he spent the weekend in question at the residence of a woman he had met in a bar that Friday. *Id.* at 761-67.

The jury found Korp guilty as charged. The trial court sentenced Korp to six years executed in the Department of Correction with two years suspended to probation. Korp filed a petition for permission to file a belated notice of appeal, which this Court granted in an unpublished memorandum decision. *Korp v. State*, 888 N.E.2d 877, No. 75A03-0803-CR-98 (Ind. Ct. App. June 13, 2008), *trans. denied*. Korp now appeals his conviction.

Discussion and Decision

On appeal, Korp contends that the trial court abused its discretion by excluding at trial evidence of Kenneth's 1996 conviction for sexual misconduct with a minor and 2007 conviction for child exploitation. Additionally, Korp contends that the exclusion of the evidence violated his right to present a defense.

I. Indiana Evidence Rule 404(b)

Korp argues that the trial court abused its discretion by excluding the evidence of Kenneth's criminal history. Generally, a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *McHenry v. State*, 820 N.E.2d 124, 128 (Ind. 2005). We will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997), *reh'g denied*.

We find that the trial court correctly excluded the evidence under Indiana Evidence Rule 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

The rule is designed to prevent the jury from assessing a defendant's present guilt on the basis of his or her past propensities. *Hicks v. State*, 690 N.E.2d 215, 218 (Ind. 1997). Thus, past actions may be admissible to prove motive, intent, or other proper purpose, but not propensity. *Id.* When considering the admissibility of 404(b) evidence, the court must also balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. *Id.* at 221.

The Indiana Supreme Court held in *Garland v. State*, 788 N.E.2d 425 (Ind. 2003), that Evidence Rule 404(b) applies to evidence about the bad acts of non-parties as well as parties. *Kien v. State*, 866 N.E.2d 377, 383 (Ind. Ct. App. 2007), *trans. denied*. As a result, in order for evidence about the bad acts of a non-defendant to be admissible, one of the exceptions of Rule 404(b) must apply. *Garland*, 788 N.E.2d at 430. The court must also balance the probative value of the evidence against its prejudicial effect. *Roop v. State*, 730 N.E.2d 1267, 1270 (Ind. 2000).

This case is similar to *Roop*. In that case, the defendant sought to introduce hearsay evidence showing that the victim's grandfather, who lived next door to the victim, had molested the victim's mother when she was a child and was therefore also responsible for the molestation of infant K.S. *Id.* at 1269. Our Supreme Court held that although evidence which tends to show that someone else committed the crime may be relevant under Indiana Evidence Rule 401, the trial court properly excluded the defendant's proffered hearsay testimony under Indiana Evidence Rules 404(b) and 403. *Id.* at 1270. For the evidence to be admissible, it must bear "on some issue other than criminal propensity and clear[] the balancing hurdle of Rule 403[.]" *Id.*

As in *Roop*, Korp asserts no proper purpose for which Kenneth's convictions were offered. It appears instead that the evidence was offered solely to suggest that Kenneth has a record of improper conduct with minors and therefore has a propensity to molest. This is the "forbidden inference" that Rule 404 is designed to prohibit. *Id.* Indeed, at the sentencing hearing, Korp's counsel stated, "This kid had significant time with a child molester, both before and during the time period in question. . . . a convicted child

molester, who had the propensity to drug [H.V.]’s older sisters and certainly had the propensity to do any number of things to this little girl.” Sent. Tr. p. 17.

The remoteness in time between the 1996 conviction and H.V.’s allegations, and the factual differences between the 2007 offense and H.V.’s allegations, further undermine their admissibility. *See id.* The total lack of evidence that Kenneth, rather than Korp, was responsible for the molestation also undermines its admissibility. We cannot say that the trial court abused its discretion by excluding the evidence of Kenneth’s bad acts.³

II. Right to Present a Defense

Korp contends that the application of Indiana Evidence Rule 404(b) violated his right to present a defense. Korp argues that when a defendant’s Sixth Amendment right to present a defense collides with the State’s interest in promulgating rules of evidence to govern trials, the State’s interest must give way to the defendant’s rights if the rules are applied “mechanistically” to deprive the defendant of a fair trial. *See Hubbard v. State*, 742 N.E.2d 919, 922 (Ind. 2001).

Every defendant has the fundamental right to present witnesses in his or her own defense. *Roach v. State*, 695 N.E.2d 934, 939 (Ind. 1998), *reh’g granted on other grounds*. This right is “in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may

³ We also note that the evidence could not be used for impeachment purposes under Indiana Evidence Rule 609. *See Whiteside v. State*, 853 N.E.2d 1021, 1025 n.4 (Ind. Ct. App. 2006) (“For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.”) (quoting Ind. Evidence Rule 609(a)).

decide where the truth lies.” *Id.* (quotation omitted). However, the right to present witnesses is not absolute. *Id.* The defendant, and also the State, “must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* (quotation omitted).

Korp’s right to present a defense was not violated. Although the trial court excluded evidence of Kenneth’s convictions, Korp was able to present his defense that it was Kenneth who molested H.V. Korp’s counsel mentioned in opening statements that Kenneth had been alone with H.V. and that Kenneth, the first adult to hear the allegations, did not report the crime and was not questioned about H.V.’s allegations. Korp was able to ask several witnesses, including H.V. and J.V., whether Kenneth had ever touched H.V. inappropriately. H.V. testified that Korp had molested her and that no one else had touched her inappropriately. The other witnesses testified that H.V. had always maintained that Korp, not Kenneth, had molested her. Korp had the opportunity to present evidence that Kenneth was responsible, but failed to prove his theory. *See Garland*, 788 N.E.2d at 430 (“Where a defendant has probative, admissible evidence that Jones did it, regular due process would admit the evidence. But what if the defendant has little or no direct evidence that Jones did it? Can the defendant offer evidence about Jones’ prior bad acts as proof that Jones acted in conformity with his demonstrated character by committing the instant crime? We think the defendant may do so only when the exceptions of 404(b) apply.”). The trial court’s decision prevented Korp from injecting possibly prejudicial evidence into the trial, and the proposed evidence did not

negate any element of the charged offense against Korp. As a result, the trial court did not abuse its discretion by excluding the evidence of Kenneth's bad acts.

Affirmed.

RILEY, J., and DARDEN, J., concur.